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FIRST GENERAL COUNSEL'S REPORT

MUR 6289

DATE COMPLAINT FILED: 5/12/10

DATE OF NOTIFICATION: 5/17/10

LAST RESPONSE RECEIVED: 7/7/10

DATE ACTIVATED: 7/20/10

EXPIRATION OF SOL: 5/10/15-5/30/15

COMPLAINANT:

Sean Fox

RESPONDENTS:

Jeff Denham

Denham for Congress and

David Bauer, in his official capacity as treasurer

Picayune Rancheria of the Chukchansi Indians

Remembering the Brave Foundation

RELEVANT STATUTES

and REGULATIONS:

2 U.S.C. § 434(b)

2 U.S.C. § 434(f)

2 U.S.C. § 441a

2 U.S.C. § 441b(a)

2 U.S.C. § 441d

11 C.F.R. § 100.29

11 C.F.R. § 104.20

11 C.F.R. § 109.21

11 C.F.R. § 300.65

INTERNAL REPORTS CHECKED: Disclosure Reports

OTHER AGENCIES CHECKED: California Secretary of State

MUR 6362

DATE COMPLAINT FILED: 8/31/10

DATE OF NOTIFICATION: 9/1/10

LAST RESPONSE RECEIVED: 10/20/10

DATE ACTIVATED: 11/24/10

EXPIRATION OF SOL: 4/12/15-5/30/15

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COMPLAINANTS:

Tal Cloud
Mike Der Manouel, Jr.

RESPONDENTS:

Jeff Denham
Denham for Congress and
David Bauer, in his official capacity as treasurer
Picayune Rancheria of the Chukchansi
Indians/Chukchansi Tribal Government
Remembering the Brave Foundation
Californians for Fiscally Conservative Leadership
Gilliard, Blanning & Associates, Inc.
(Dave Gilliard & Carlos Rodriguez)
Jeff Denham for State Senate and
David Bauer, in his official capacity as treasurer

**RELEVANT STATUTES
and REGULATIONS:**

2 U.S.C. § 431(20)(A)(iii)
2 U.S.C. § 434(b)
2 U.S.C. § 434(f)
2 U.S.C. § 434(g)
2 U.S.C. § 441a
2 U.S.C. § 441b(a)
2 U.S.C. § 441d
2 U.S.C. § 441i(e)
11 C.F.R. § 100.29
11 C.F.R. § 104.20
11 C.F.R. § 109.21
11 C.F.R. § 110.3(d)
11 C.F.R. § 300.65

INTERNAL REPORTS CHECKED: Disclosure Reports

OTHER AGENCIES CHECKED: California Secretary of State

I. INTRODUCTION

These two matters concern ads broadcast by Remembering the Brave Foundation ("RB"), a section 501(c)(3) charitable organization, to promote a May 28, 2010, benefit concert in support of a program in California to create specialized license plates for families of military personnel killed on active duty. The ads featured Jeff Denham, a California State Senator and a

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1 candidate in the primary election for the 19th Congressional District in California, and were
2 disseminated within 30 days of the California Congressional primary election on June 8, 2010.
3 These ads were allegedly financed from funds Denham transferred from Jeff Denham for State
4 Senate ("State Committee"), Denham's State Campaign Committee, to RB. The concert was
5 held at the Chukchansi Gold Resort & Casino.

6 The complaints in these two matters involve the same underlying facts and similar
7 allegations that Denham, his State and Federal Campaign Committees, and various other entities
8 and individuals violated the Federal Election Campaign Act of 1971, as amended (the "Act"). In
9 MUR 6289, the complainant alleged that the advertisements promoting the concert were
10 coordinated electioneering communications, which were paid for by the Picayune Rancheria of
11 the Chukchansi Indians (a/k/a the Chukchansi Tribal Government)(the "Tribe"), resulting in
12 undisclosed contributions from the Tribe to Denham and Denham for Congress ("Denham
13 Federal Committee"). In MUR 6362, complainants alleged that the same communications were
14 coordinated with the Denham campaign and involved the Tribe, RB, Californians for Fiscally
15 Conservative Leadership ("CFCL"), and Gilliard, Blanning & Associates, Inc. (Dave Gilliard
16 and Carlos Rodriguez).¹ Complainants also alleged that respondents failed to disclose
17 coordinated communications and independent expenditures made in connection with the benefit
18 concert and/or Denham's Federal campaign, and may have done so to hide the true source of the
19 funding. As the complaints are factually similar, we recommend that the Commission merge the
20 two matters.

¹ The Office of Complaints & Legal Administration then contacted complainants and asked them if they wished to file a complaint and instructed them on the proper procedures. Complainants then filed the complaint, which was designated as MUR 6362.

Denham, the Denham Federal Committee, and RB filed a joint response to the complaint in MUR 6289, stating that RB, not the Tribe, paid for the ads at issue, and asserting that no violations occurred because the ads do not contain express advocacy or its functional equivalent.² The Denham respondents and RB did not file a separate response to the complaint in MUR 6362. The Tribe and CFCL filed a joint response to the complaint in MUR 6362. The Tribe stated that there is no basis for finding that it made coordinated communications or otherwise violated the Act. The Tribe acknowledged that it provided the venue for and distributed promotional materials about the concert, but stated that none of the promotional materials referred to Denham or to any candidate. CFCL stated that it is a tax-exempt 527 organization that is registered with the Commission as an independent-expenditure-only committee. CFCL stated that it was formed after the concert and was not involved with it. CFCL asserted that it did not coordinate with the Denham campaign and properly disclosed its independent expenditures to the Commission. Respondents Denham State Committee, Gilliard, Blanning & Associates, Inc. ("GBA"), Dave Gilliard, and Carlos Rodriguez, who were named as respondents in MUR 6362, did not file a response to that complaint.

We conclude that the radio and television ads at issue meet the definition of "coordinated communications," but qualify for the safe harbor for candidate charitable solicitations under 11 C.F.R. § 109.21(g) because: (1) the ads do not promote, support, attack, or oppose ("PASO") Denham or any other Federal candidate(s); (2) RB, the organization for which the funds were solicited, is a 501(c)(3) tax-exempt organization as described at 11 C.F.R. § 300.65; and

² The response was originally filed on behalf of Denham and the Federal Committee because at the time it was filed, RB was not a respondent. We construe this response to be filed on behalf of RB as well because counsel for RB also represents Denham and the Federal Committee, and because counsel eventually filed a designation of counsel form on behalf of all three parties in MUR 6289. However, counsel did not submit a designation of counsel form for RB in MUR 6362. We have contacted counsel several times about the missing designation of counsel form for RB, but have not heard back to date. Though we recommend the Commission merge the two matters, out of an abundance of caution, we intend to send a copy of the notification to RB under separate cover.

1 (3) the funds appeared to have been raised solely for charitable purposes, *i.e.*, donations to RB, a
2 501(c)(3) organization to benefit the Gold Star Project. Accordingly, we recommend that the
3 Commission find no reason to believe that Remembering the Brave Foundation made a
4 prohibited in-kind corporate contribution resulting from coordinated communications in
5 violation of 2 U.S.C. § 441b(a); no reason to believe that Jeff Denham and Denham for Congress
6 and David Bauer, in his official capacity as treasurer, accepted and received prohibited in-kind
7 corporate contributions resulting from coordinated communications in violation of 2 U.S.C.
8 § 441b(a); and no reason to believe that Denham for Congress and David Bauer, in his official
9 capacity as treasurer, failed to report such contributions in violation of 2 U.S.C. § 434(b).

10 While the ads are exempt from the definition of coordinated communications under the
11 safe harbor for candidate charitable solicitations that do not PASO a Federal candidate, they
12 nevertheless meet the definition of electioneering communications, and RB, the entity that paid
13 for the ads, was required to file disclosure reports and comply with disclaimer rules for
14 electioneering communications, but did not do so. Accordingly, we recommend that the
15 Commission find reason to believe that Remembering the Brave Foundation violated 2 U.S.C.
16 §§ 434(f) and 441d.

17 The available information indicates that RB paid for the ads. However, other
18 information, including the timing and amount of the funds transferred from Denham's State
19 account to RB, suggests that the Denham State Committee may have been the source of some or
20 all of the funding for the ads. If so, then the Denham State Committee transferred or spent non-
21 federal funds to finance electioneering communications, which would violate 2 U.S.C.
22 § 441i(e)(1) and 11 C.F.R. § 110.3(d). Accordingly, we recommend that the Commission find
23 reason to believe that Denham and his State and Federal Committees violated 2 U.S.C.

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1 § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) and authorize an investigation of the circumstances
2 surrounding the funding of the ads. After the investigation, we will make appropriate
3 recommendations to the Commission regarding the respondents in this matter.

4 Finally, the available information does not support general allegations made by
5 complainants in MUR 6362 that the Tribe, CFCL, GBA, Dave Gilliard, and Carlos Rodriguez
6 violated the Act in connection with the making of undisclosed coordinated and independent
7 expenditures relating to the Denham campaign and/or the benefit concert. Accordingly, we
8 recommend that the Commission find no reason to believe that the above-mentioned respondents
9 violated any provision of the Act or regulations in connection with the allegations in these
10 matters.

11 **II. FACTUAL BACKGROUND**

12 In 2010, Jeff Denham was both a California State Senator, representing the 12th District,
13 and a candidate for the U.S. House of Representatives for California's 19th Congressional
14 District. Denham did not run for re-election to the State Senate. Denham won the June 8, 2010,
15 Republican primary and the November 2, 2010, general election.

16 In the two months before the June 8 primary, Denham's State Committee made transfers
17 totaling \$225,000 to RB, an entity organized under Section 501(c)(3) of the Internal Revenue
18 Code (26 U.S.C. § 501(c)(3)). RB honors veterans killed in action, and it organizes ceremonies
19 and events to honor deceased servicemembers and their families. See
20 <http://www.rememberingthebrave.org/> (last visited on January 24, 2011). The transfers included
21 a \$25,000 donation made on April 12, 2010, and three loans, which the Committee forgave; a

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1 \$100,000 loan made on April 19, 2010, a \$50,000 loan made on May 12, 2010, and a \$50,000
2 loan on May 25, 2010.³

3 Eleven days before the June 8 primary, a benefit concert was held at the Chukchansi Gold
4 Resort & Casino, in Coarsegold, California, which is in the 19th Congressional District. The
5 concert, sponsored by RB and featuring country and western music performer Phil Vassar, was
6 advertised on radio, television, and the internet as a benefit concert to raise donations for Project
7 Gold Star—a program administered by the California Department of Veteran Affairs to raise
8 private donations to pay the costs of a specialized license plate program for the families of U.S.
9 military personnel killed while serving on active duty. Several of the advertisements promoting
10 the concert featured Denham. RB asked Denham to act as spokesperson and to appear in the ads
11 because of his “long-standing association with veterans’ issues and the Gold Star Project
12 legislation.” Denham Response at 2. Denham, an Air Force veteran, was Chairman of the
13 Veterans’ Affairs Committee while he was a California State Senator and was a coauthor of
14 Senate Bill 1455, the California Gold Star Family License Plate bill. Project Gold Star was
15 signed into law in September 2008.

16 Complainant in MUR 6289 provided a “Transcript of Coordinated Ads,” which contains
17 a link to the television ad as posted on the internet at <http://www.rememberthebrave.com/>, a
18 transcript of the radio ad, and a list of seven TV and radio stations that aired the ads. The ads
19 aired in May 2010, up to the date of the event.

20

³ See <http://cal-access.sos.ca.gov/PDFGen/pdfgen.prp?filingid=1521503&amendid=0> (last visited on March 14, 2011). See <http://cal-access.sos.ca.gov/PDFGen/pdfgen.prp?filingid=1568050&amendid=0> (last visited on March 14, 2011).

TRANSCRIPT OF RADIO AD:

ANNOUNCER: Join country superstar Phil Vassar for a one-night Remember the Brave benefit concert, Friday May 28th Memorial weekend at Chukchansi Gold Resort and Casino. Veteran Affairs Committee Chairman Senator Jeff Denham.

JEFF DENHAM: As a veteran, I know the sacrifices of our servicemen and women, and the sacrifice shared by their loved ones who pray for their safe return. But some of them don't make it, their families then become Gold Star families. This event will raise funds for Gold Star families and the Gold Star project as recognition for their ultimate sacrifice. Please join us at our benefit concert on May 28th Memorial weekend. If you can't make it, go to Remember the Brave dot com to learn more and to make your tax-deductible donations. Remember, every dollar counts.

I'm Senator Jeff Denham.

ANNOUNCER: Join Phil Vassar and Jeff Denham at the Remember the Brave benefit concert. For tickets go to Chukchansi Gold Resort and Casino or visit Ticketmaster dot com.

TRANSCRIPT OF TELEVISION AD (as posted on the internet):
<http://www.rememberthebrave.com/>

PAGE 1: At top of page is the logo of Remembering the Brave, followed by Benefit Concert. Underneath it is "Phil Vassar" followed by the date (May 28th) and location of the event (Chukchansi Gold Resort & Casino), a photo of a sample specialized license plate next to a statement: "Proceeds benefit the California Department of Veteran Affairs Project Gold Star, a link to the California Department of Veteran Affairs website, and two buttons: "Buy Tickets" and "Donate."

PAGE 2: (Video)(30 seconds):

- **First clip:** Phil Vassar live concert and a voiceover "Join country superstar Phil Vassar for a one night benefit concert" while the following words flash on the screen "Remember the Brave" "Chukchansi Gold Resort and Casino" and "May 28th".
- **Second clip:** Denham with 3 other individuals, two of whom appear to be veterans. Denham is standing in the middle of the group while the words "Senator Jeff Denham, Chairman, Veterans Affairs" flash on the screen. Denham then says "As a veteran, I know the sacrifices of our service men and women. A sacrifice shared by their loved ones who pray for their safe return. But some don't make it. Their families then become Gold Star Families."

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- Third clip: Phil Vassar concert and a voiceover "Join Phil Vassar at the Remember the Brave benefit concert. Visit Ticketmaster dot com for your tickets today" while the words "May 28th" "Chukchansi Gold Resort and Casino" and "Ticketmaster.com" flash on the screen.
- Fourth clip: same shot of Denham with the veterans and Denham saying "If you can't make it, go to Rememberthebrave.com to learn more" while the words "Rememberthebrave.com" flash on the screen.

TRANSCRIPT OF INTERNET AD:

- Left side of screen: Photo of Denham and the words "State Senator Jeff Denham, Veterans' Affairs Committee" under the photo.
- Right Side of screen: Message "As a veteran, I know the sacrifices of our service men and women. A sacrifice shared by their loved ones who pray for their safe return. But some don't make it. Their families then become Gold Star Families. We're raising funds to make available commemorative license plates for these families as recognition for their sacrifice. Please join us at our benefit concert on May 28th. If you can't attend, I urge you to learn more [link] about these families and make a tax-deductible contribution [link]. Remember, every dollar counts. Learn More: California Department of Veteran Affairs – Project Gold Star [link].
- Bottom of screen: rememberthebrave.com is a project of Remembering The Brave Foundation, a 501(c)(3) not-for-profit organization. For more information, please visit www.RememberingTheBrave.org. Contributions and donations are tax deductible and directly benefit the Remembering the Brave Foundation.

According to the response, RB sponsored the benefit concert, the proceeds of which were donated to Project Gold Star. Denham Response at 2. The response stated that RB, not the Tribe, produced, aired, and paid for the radio, television, and internet ads. *Id.* Documentation submitted with the complaint in MUR 6362 indicates that GBA and Alamance Advisors handled the media buy for the concert on behalf of its client, RB. See Emails between Janet Slagle (media buyer with GBA) to Matt Rosenfeld (President/General Manager for KSEE-NBC24, KSEE Weather Plus, and LATV la alternativo), dated April 29, 2010, regarding Gold Star Families Proposal. It also appears that GBA and Alamance Advisors handled the media buys for

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1 the Denham for Congress campaign in 2010.⁴ See Emails from Genet Slagle to Donald Osika,
2 dated January 29, 2010. The response by the Denham respondents and RB did not specify how
3 much was spent on the ads, but does not dispute the \$100,000-\$200,000 amount mentioned in the
4 complaint. It appears that RB raised a total of \$105,440.24, about a third of the total amount
5 raised (\$300,000) for Project Gold Star.⁵

6 The response acknowledged that the ads aired during May 2010, up until the May 28th
7 date of the benefit concert, which was within thirty (30) days of the California Congressional
8 primary election in which Denham appeared as a candidate. *Id.* at 4. However, the response
9 argued the concert was scheduled for May 28th because it was close to Memorial Day, an
10 appropriate date on which to hold an event related to veteran/military issues and causes, and not
11 because May 28 was close to the primary. *Id.* at 6. The response also stated that the ads aired
12 over a geographic area around the Casino where the concert was held and included Denham's
13 State Senate district, the 19th Congressional District, and areas beyond. *Id.* at 4. Finally, the
14 response acknowledged that the ads could be received by more than 50,000 people within the
15 19th Congressional District. *Id.*

16 In its response, the Tribe acknowledged that the Casino served as the venue for the May
17 28th charity event, which was organized by RB. Tribal/CFCL Response at 4. The response

⁴ The Denham Federal Committee's 2010 April Quarterly Report reflects disbursements to GBA and to Alamance for broadcast advertising.

⁵ The California Department of Veteran Affairs announced that Project Gold Star had met its fundraising goal. See <http://www.cdva.ca.gov/newhome.aspx> (last visited on January 24, 2011). RB posted a letter from the Department of Veteran Affairs thanking it for its \$105,440.24 donation in support of Project Gold Star. See <http://www.senatorforthebrave.org/news/>. On this letter is a handwritten note, indicating that this was the single largest donation received. *Id.* In a news release announcing that the Gold Star Project had raised \$300,000 and that the Gold Star plate initiative had passed, RB acknowledges that it "together with Senator Denham, his supporters, and other contributors ... raised approximately one-third of the funds needed to get the license plate initiative passed." *Id.*

1 further stated that the Tribe made the following in-kind donations in support of the benefit
2 concert: the use of its casino as the venue for the concert, a newspaper strip ad with the Fresno
3 Bee, rack cards for distribution, postcards for distribution to Chukchansi guests, automated
4 phone calls to Chukchansi guests, food vouchers with the purchase of two tickets to the event,
5 rooms and meals for performers, an email blast, posters, and casino overhead announcements.
6 *Id.* at 4-6. In addition, the response noted that several television and radio stations ran public
7 service announcements ("PSAs") promoting the concert, which were provided without cost to
8 the Tribe. *Id.* Finally, the response asserted that the Tribe did not pay for or distribute any
9 promotional materials that referred to Denham or to any clearly identified candidate, did not
10 disseminate campaign materials prepared by the candidate, and did not expressly advocate the
11 election or defeat of a clearly identified candidate. *Id.* at 5. The Tribe provided copies of the
12 promotional materials, and none of the ads provided refer to Denham or other clearly identified
13 candidate. Regarding CFCL, the response stated that it made independent expenditures in the
14 form of radio ads in the period before the California primary, but that these expenditures were
15 separate from the benefit concert, were not coordinated with the Denham campaign, and were
16 properly reported to the Commission. *Id.* at 6-7.

17 **III. LEGAL ANALYSIS**

18 **A. Coordinated Communications**

19
20 The Act subjects contributions and expenditures to certain restrictions, limitations, and
21 reporting requirements. *See generally* 2 U.S.C. §§ 441a, 434b. Contributions can be monetary
22 or "in-kind." In-kind contributions include an expenditure made by any person "in cooperation,
23 consultation, or concert with, or at the request or suggestion of, a candidate, his authorized

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1 political committees, or their agents," and are subject to the same restrictions and reporting
2 requirements as other contributions. 2 U.S.C. § 441a(a)(7)(A) and (B)(i); 11 C.F.R.
3 §§ 100.52(d)(1), 109.21(b). The Commission's regulations at 11 C.F.R. § 109.21 provide that ~~the~~
4 coordinated communications constitute in-kind contributions from the party paying for such
5 communications to the candidate, the candidate's authorized committee, or the political party
6 committee which coordinates the communication. A corporation is prohibited from making any
7 contributions in connection with a Federal election. 2 U.S.C. § 441b(a).

8 A communication is coordinated if it is paid for by someone other than the candidate or
9 the candidate's authorized committee (or the political party committee, where applicable); it
10 satisfies one or more content standards; and it satisfies one or more conduct standards. All three
11 prongs must be met for a communication to be considered coordinated. 11 C.F.R. § 109.21. The
12 Commission's regulations exempt from the definition of "coordinated communication" a public
13 communication in which a Federal candidate solicits funds for organizations as permitted by
14 11 C.F.R. § 300.65, provided that the public communication does not PASO the soliciting
15 candidate or that candidate's opponent(s) in the election.⁶ See 11 C.F.R. § 109.21(g)(2). Federal

⁶ In the recent rulemaking on coordinated communications, the Commission considered adding a safe harbor for public communications in support of certain tax-exempt nonprofit organizations, but did not do so. The safe harbor would have excluded from the definition of coordinated communication any public communication paid for by a 501(c)(3) organization, in which a candidate seeks support for the payor organization, unless the public communication PASOs the candidate or another candidate who seeks the same office. The proposed safe harbor was intended to address communications like the ones in MUR 6020 (Alliance/Pelosi). MUR 6020 involved a TV advertisement paid for by a 501(c)(3) organization. In the ad, a Federal candidate appeared, discussed environmental issues, and asked viewers to visit a Web site sponsored by the organization paying for the ad. Because the ad solicited general support for the organization's Web site and cause, but did not solicit funds for the organizations, it did not qualify for the existing solicitation safe harbor at 11 C.F.R. § 109.21(g)(2). In the EACJ, the Commission stated that it was not adopting the proposed safe harbor because the enforcement action that prompted it (MUR 6020) was the only Commission enforcement action to date in which a 501(c)(3) organization paid for a public communication that satisfied all three prongs of the coordinated communication test. See EACJ, Coordinated Communications, 75 Fed. Reg. 55960 (Sep. 15, 2010). The Commission noted "[t]he lack of any additional complaints against 501(c)(3) organizations under the coordinated communications rule indicates that there is no significant need for the proposed safe harbor at this time." *Id.*

1 candidates and officeholders may solicit funds for tax-exempt organizations as described in
2 26 U.S.C. § 501(c). 11 C.F.R. § 300.65.

3 The radio and television ads at issue meet all three prongs of the coordination test. The
4 payment prong is satisfied because there is information that the ads were paid for by RB,
5 someone other than the candidate, his authorized committee, or political party committee.⁷
6 11 C.F.R. § 109.21(a)(1). The content prong is satisfied because the communications qualify as
7 public communications which "refer[] to a clearly identified House or Senate candidate that
8 [are] publicly distributed or otherwise publicly disseminated in the clearly identified candidate's
9 jurisdiction 90 days or fewer before the ...primary or preference election."⁸ 11 C.F.R.
10 § 109.21(c)(4)(i). The content prong is also satisfied because the ads meet the definition of
11 electioneering communications. 11 C.F.R. § 109.21(c)(1). The ads are electioneering
12 communications because they were publicly distributed on radio and television, refer to a clearly
13 identified candidate for Federal office, were publicly distributed within 30 days before the
14 primary election, and were targeted to the relevant electorate (the ads could be received by
15 50,000 or more persons in the district that Denham sought to represent (19th Congressional
16 District)).⁹ 11 C.F.R. § 100.29.

17 The conduct prong is satisfied if a candidate or candidate's committee assents to a request
18 or suggestion that the public communication be created, produced, or distributed, and that

⁷ As alleged in the MUR 6362 complaint, there is information suggesting that the Denham State Committee may have been the source for all or part of the funding for the ads. See Section III.C, below. If they were paid for by the Denham State Committee, the payment prong is not met and the ads are not coordinated. 11 C.F.R. § 109.21(a)(1).

⁸ A public communication includes broadcast communications. 2 U.S.C. § 431(22). It does not include internet communications, except for communications placed for a fee on another's Web site. 11 C.F.R. § 100.26. "Clearly identified" means the candidate's name or photograph appears, or "the identity of the candidate is otherwise apparent through an unambiguous reference." 2 U.S.C. § 431(18); 11 C.F.R. § 100.17.

⁹ RB's internet ads are not included in this analysis because they are exempt from the definition of electioneering communications. 11 C.F.R. § 100.29(c)(1).

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1 request or suggestion came from the person paying for the communication. 11 C.F.R.
2 § 109.21(d)(1)(ii). The response acknowledged that RB requested that Denham act as the
3 spokesperson and to appear in the ads, which he did. Denham Response at 2. Because Denham
4 is an agent of his Committee, his actions are also imputed to his Committee. 11 C.F.R.
5 §§ 109.3(b)(1), (2); 109.21(a), (d)(1)(ii).

6 Though the television and radio ads meet the definition of "coordinated
7 communications," they qualify for the safe harbor for candidate charitable solicitations in
8 11 C.F.R. § 109.21(g)(2). This provision exempts from the definition of "coordinated
9 communications" public communications in which a Federal candidate solicits funds for certain
10 tax-exempt organizations as permitted by 11 C.F.R. § 300.65, provided that the public
11 communications do not PASO the soliciting candidate or that candidate's opponents in that
12 election. In this matter, Denham, a Federal candidate, appeared and/or spoke in broadcast radio
13 and television ads to solicit funds for RB, a 501(c)(3) organization, in support of Project Gold
14 Star. The available information indicates that RB is an organization described in 11 C.F.R.
15 § 300.65, and the solicitations for donations to RB complied with the requirements of 11 C.F.R.
16 § 300.65 because they appeared to have been for the purpose of raising funds for RB in support
17 of Project Gold Star. Thus, it appears that these communications are exempt from the definition
18 of "coordinated communications" if they did not promote or support Denham and did not attack
19 or oppose his opponent.

20 It does not appear that the ads at issue promote or support Denham or attack or oppose
21 any of his opponents. Although the Commission has not defined the term "promote, support,
22 attack, or oppose," it has provided some guidance in advisory opinions as to what might
23 constitute PASO of a candidate. See AO 2009-26 (Coulson) (concluding that a state officeholder

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1 could use non-federal funds to pay for communication that did not PASO a candidate for Federal
2 office because the communication was solely part of the State officeholder's duties, did not
3 solicit donations, nor did it expressly advocate the candidate's election or the defeat of her
4 opponents); *see also* AOs 2007-34 (Jackson), 2007-21 (Holt), 2006-10 (Echostar) and 2003-25
5 (Weinzapfel) (holding that the mere identification of an individual who is a Federal candidate
6 does not, in itself, promote, support, attack or oppose that candidate).

7 The only clearly identified candidate in the ads is Denham, who is identified as a veteran,
8 a State Senator, and as Chairman of the Veterans' Affairs Committee, not as a candidate for
9 Federal office. The ads do not contain express advocacy or its functional equivalent, and do not
10 contain references to any election or political party. Given the above, it does not appear that the
11 ads PASO'd Denham or any of his opponents.

12 Neither the timing of the benefit concert nor the involvement of the Denham campaign
13 consultants/media buyer/supporters in the planning of the benefit concert and ads would appear
14 to prevent the application of the safe harbor for charitable solicitations. *See* Explanation and
15 Justification for Final Rules for Safe Harbor for Endorsements and Solicitations by Federal
16 Candidates (11 C.F.R. § 109.21(g)) 71 Fed. Reg. 33201-33202 (Jun. 8, 2006) (stating that the
17 "safe harbor applies regardless of the timing and proximity to an election ... of the solicitation
18 and [w]hen the safe harbor is applicable, the ... soliciting candidate (and the candidate's agents)
19 may be involved in the development of the communication, in determining the content of the
20 communication, as well as determining the means or mode and timing or frequency of the
21 communication."); *See also*, AO 2006-10 (Echostar).

22 Based on the above, we conclude that the ads at issue were not coordinated
23 communications and therefore recommend that the Commission find no reason to believe that

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1 Remembering the Brave Foundation made a prohibited in-kind corporate contribution resulting
2 from coordinated communications in violation of 2 U.S.C. § 441b(a); no reason to believe that
3 Jeff Denham and Denham for Congress and David Bauer, in his official capacity as treasurer,
4 accepted a prohibited in-kind corporate contribution resulting from coordinated communications
5 in violation of 2 U.S.C. § 441b(a); and no reason to believe Denham for Congress and David
6 Bauer, in his official capacity as treasurer, failed to report in-kind contributions in violation of
7 2 U.S.C. § 434(b).

8 **B. Electioneering Communications**

9 Though the television and radio ads are exempt from the definition of coordinated
10 communications because they qualify for the safe harbor for candidate charitable solicitations
11 that do not PASO a Federal candidate, they are also electioneering communications, and the
12 Commission has declined to create an exemption to the electioneering communication
13 regulations for these types of communications. Thus, the ads are subject to disclaimer and
14 disclosure requirements for electioneering communications. See AO 2006-10 (EchoStar)
15 ("[e]ven if the proposed [exempt] communications were to be made during the "electioneering
16 communication" period they would not constitute coordinated communications although they
17 would be subject to the restrictions applicable to electioneering communications, assuming they
18 otherwise satisfied the definition of "electioneering communication" at 2 U.S.C.
19 § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(a)").

20 As discussed above, the ads at issue meet the definition of electioneering
21 communications because they refer to a clearly identified federal candidate, were publicly
22 distributed within 30 days of a primary election, and were targeted to the relevant electorate.

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1 11 C.F.R. § 100.29. In addition, the ads do not qualify for any of the exemptions to the
2 definition of electioneering communications.

3 BCRA provides three exceptions from the "electioneering communication" definition,
4 none of which apply here. 2 U.S.C. § 434(f)(3)(B)(i)-(iii); 11 C.F.R. 100.29(c). In addition,
5 BCRA permits, but does not require, the Commission to promulgate regulations exempting other
6 communications, but limits this exemption authority to communications that do not PASO any
7 clearly identified candidate for Federal office. 2 U.S.C. § 434(f)(3)(B)(iv). Pursuant to this
8 authority, the Commission had exempted from the definition of "electioneering communication"
9 communications by State and local candidates, 11 C.F.R. 100.29(c)(5), and communications that
10 were paid for by any organization operating under section 501(c)(3) of the Internal Revenue
11 Code (former 11 C.F.R. § 100.29(c)(6)). The exemption for 501(c)(3) organizations was
12 challenged, and the District Court held that the Explanation and Justification for the regulation
13 did not provide sufficient analysis under the APA and remanded the regulation to the
14 Commission for further action consistent with its order. *See Shays v. FEC*, 337 F.Supp. 2d 28,
15 128 (D.D.C. 2004). Rather than appeal that portion of the district court's decision, the
16 Commission initiated a rulemaking to determine whether the Commission should retain the
17 exemption for section 501(c)(3) organizations from the electioneering communications rules at
18 11 C.F.R. § 100.29(c)(6). (The Commission appealed another part of the district court decision,
19 and the Court of Appeals affirmed.) The Commission decided to rescind the exemption and
20 apply the same general electioneering communications rules to 501(c)(3) organizations. *See also*
21 *Final Rules and Explanation and Justification for Electioneering Communications*, 70 Fed. Reg.
22 75713 (December 21, 2005) (stating that "[i]n BCRA, Congress defined 'electioneering
23 communication' in terms that are easily understood and objectively determinable" and the

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Commission is declining to adopt an exemption for all communications that do not PASO a Federal candidate because doing so "would replace entirely Congress's preferred bright-line definition of 'electioneering communication' with the standard that Congress relegated to the back-up definition.")

In *Citizens United v. Federal Election Commission*, the Supreme Court struck down as unconstitutional the Act's prohibition on corporate financing of electioneering communications at 2 U.S.C. § 441b(b)(2), *see* 130 S.Ct. 876, 813 (2010), but the Court upheld the Act's disclosure and disclaimer provisions applicable to electioneering communications at 2 U.S.C. §§ 434(f) and 441d and 11 C.F.R. §§ 104.20 and 110.11. *See id.* at 915-916. Thus, like all persons making electioneering communications that cost, in the aggregate, more than \$10,000, corporations must comply with the existing disclosure requirements for electioneering communications.¹⁰

The complaint alleges that \$100,000--\$200,000 was spent on the ads. Respondents do not contradict this amount, and RB did not file reports regarding these electioneering communications. Accordingly, we recommend that the Commission find reason to believe that Remembering the Brave violated 2 U.S.C. § 434(f) by failing to report electioneering communications. We will need to conduct a limited investigation to determine the exact amount spent on the ads in order to calculate the amount in violation.

¹⁰ Counsel for the Denham respondents and RB argued that the ads at issue cannot be regulated under *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL II*) because they do not contain express advocacy or the functional equivalent thereof. In *WRTL II*, the Supreme Court concluded that the electioneering communications financing restrictions are unconstitutional as applied to ads that are not express advocacy or its functional equivalent. This holding does not mean that the Court also invalidated the disclosure and disclaimer provisions for electioneering communications. The plaintiff in *WRTL II* challenged only the corporate and labor organization funding restrictions and did not contest the statutory definition of "electioneering communication" in section 434(f)(3), the reporting requirements in section 434(f)(3), or the disclaimer requirements in section 441d. *See WRTL II*, 127 S.Ct. at 2658-59; *see also* Explanation and Justification for Electioneering Communications, 72 Fed. Reg. 72899, 72901 (Dec. 26, 2007).

1 Electioneering communications are also subject to disclaimer rules. 2 U.S.C. § 441d(a).
2 For a communication not authorized by a candidate or his campaign committee, the disclaimer
3 notice must identify who paid for the message, state that it was not authorized by any candidate
4 or candidate's committee, and list the permanent street address, telephone number, or World
5 Wide Web address of the person who paid for the communication. 11 C.F.R. § 110.11(b)(3).
6 For radio messages not authorized by the candidate, the disclaimer notice must include the name
7 of the person responsible for the communication and any connected organization. 11 C.F.R.
8 § 110.11(c)(4)(i). For television ads, the disclaimer must be conveyed by a "full-screen view of
9 a representative of the political committee or other person making the statement," or voice-over
10 by the representative. 11 C.F.R. § 110.11(c)(4)(i)-(ii) and 2 U.S.C. § 441d(d)(2). The
11 disclaimer statement must also appear in writing at the end of the communication in a "clearly
12 readable manner" with a "reasonable degree of color" contrast between the background and the
13 printed statement "for a period of at least four seconds." 11 C.F.R. § 110.11(c)(4)(iii).

14 While the ads clearly identify RB as the organization sponsoring the Benefit Concert and
15 conducting the fundraising for Project Gold Star, they do not indicate who paid for the message
16 and whether or not the message was authorized by any candidate or candidate's committee.
17 Thus, the ads do not fully comply with the disclaimer requirements for electioneering
18 communications. Accordingly, we recommend that the Commission find reason to believe that
19 Remembering the Brave violated 2 U.S.C. § 441d by failing to include sufficient disclaimers on
20 its radio and television advertisements.

21 While we conclude that the ads at issue are exempt from the definition of coordinated
22 communications under the safe harbor for candidate charitable solicitations that do not PASO a
23 candidate, we believe that the Commission should still pursue the reporting and disclaimer

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1 violations for electioneering communications in this matter. The Commission has in the past
2 dismissed electioneering communication reporting and disclaimer violations when the
3 communication in question "focused primarily" on a non-Federal candidate and contained
4 "incidental" information regarding a different Federal candidate. See Statement of Reasons of
5 Commissioners Bauerly, Hunter, McGahn, Petersen, and Weintraub in MUR 6126 (Republican
6 Senate Campaign Committee). Denham's appearance in the communications was more than
7 incidental. He was the spokesperson for the event, did most of speaking in the radio ad,
8 appeared live in the television ads for approximately 10 seconds of a 30-second ad, and had his
9 name flash on the screen. Moreover, the apparent involvement of Denham campaign consultants
10 in the purchase of the ads and the Denham State Campaign Account's role in funding the ads
11 militates against a dismissal.

12 C. Transfers of Denham State Committee Funds to RB
13

14 The available information indicates that RB paid for the ads. However, it was alleged
15 that the Denham State Committee may have been the source for part or all of the funds used to
16 finance the ads. If true, then non-Federal funds from Denham's State Committee would have
17 been used to finance electioneering communications. The Act prohibits a Federal candidate, a
18 candidate's agent, or entities directly or indirectly established, financed, maintained or controlled
19 by or acting on behalf of them from soliciting, receiving, directing, transferring or spending
20 funds in connection with a Federal or non-Federal election, including Federal election activity,
21 unless those funds are subject to the limitations, prohibitions, and reporting requirements of the

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1 Act.¹¹ 2 U.S.C. § 441i(e)(1) and 11 C.F.R. §§ 300.61 and 300.62. Likewise, transfers of funds
2 or assets from a candidate's non-Federal campaign committee or account to his or her principal
3 campaign committee for a Federal election are prohibited. 11 C.F.R. § 110.3(d). Thus, Denham
4 and Denham's State Committee may have violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R.
5 § 110.3(d) by transferring and/or spending non-federal funds to pay for electioneering
6 communications featuring Denham, and Denham's Federal Committee may have violated
7 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 110.3(d) by receiving such funds. We conclude that
8 electioneering communications are "in connection" with an election since they are required to be
9 disclosed to the Commission. *See Citizens United*, 130 S.Ct. at 914 (stating "[i]n *Buckley*, the
10 Court explained that disclosure could be justified based on a governmental interest in
11 'provid[ing] the electorate with information' about the sources of election-related spending.").
12 Denham's State Committee made transfers totaling \$225,000 (a \$25,000 donation and \$200,000
13 in loans, since forgiven) to RB during the same time period that RB paid for and ran ads that
14 featured Denham promoting a benefit concert and soliciting funds for RB.¹² The timing of the
15 transfers and the amount transferred may indicate that these funds were intended or designated to
16 be used to pay for the ads featuring Denham. The amounts transferred (\$225,000) were
17 significant and appear to have been intended to cover the costs of the advertising, given that RB

¹¹ Federal election activity includes: voter registration activity during the period 120 days before a primary or general election and ending on election day itself; voter identification, get-out-the-vote and generic campaign activity conducted in connection with an election in which a Federal candidate appears on the ballot; a public communication that refers to a clearly identified candidate for Federal office and that promotes, attacks, supports or opposes any candidate for Federal office; and services provided during any month by any employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election. 11 C.F.R. § 106.24.

¹² California law allows state and local candidates to raise funds from persons in amounts greater than the contribution limits under the Act and from sources that would be prohibited under the Act. *See generally* CAL. GOVT CODE § 85380 *et seq.* The State Committee's disclosure reports to the Secretary of State indicate that it received contributions in amounts and from sources that are permitted under California law, but are not permitted under the Act.

1 reported approximately \$100,000 in donations received for the entire year on its 2009 tax filings
2 and net assets of approximately \$26,000 at the end of 2009. In addition, RB raised \$105,440 for
3 Project Gold Star. Complainants alleged that the ads cost between \$100,000 and \$200,000, and
4 Respondents do not deny this allegation. Thus, the available information indicates that RB did
5 not raise much more for Project Gold Star than the cost of ads, and it is possible that the ads cost
6 far more than the amount RB raised. Moreover, the role of Denham's campaign consultants in
7 purchasing the advertising for the concert and certain documents submitted with the Complaint
8 in MUR 6362 (including a January 2010 email from John Harris, a Denham supporter, which
9 states that Denham mentioned that he thought he could use \$700,000 in state campaign funds on
10 his Federal campaign, and a Chukchansi Marketing Department Agenda, dated May 20, 2010,
11 stating that the benefit concert's purpose is "to raise funds" for the campaigns of Denham and
12 another candidate (described in the Tribe's response as an "erroneous characterization" of the
13 benefit concert that was corrected in the final minutes of the meeting)), also support the
14 interpretation that the Denham State Committee may have made the transfers for ads featuring
15 Denham.

16 However, even if the transfers from Denham's State Campaign Account to RB were
17 intended to finance the ads, the transfers may not violate 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R.
18 § 110.3(d) because RB, as a 501(c)(3) organization that does not appear to spend funds, in
19 general, in connection with any Federal or non-Federal election, including Federal election
20 activity, may be a lawful recipient of such funds.¹³ Nevertheless, in past instances where the

¹³ California law permits candidates and officials to donate surplus campaign funds to a charity so long as the entity is a bona fide charitable tax-exempt nonprofit organization and the donation will not have a material financial effect on the former candidate or official. See CAL. GOVT CODE § 89519. Also, since the ads themselves did not expressly advocate Denham's election or PASO him or any other candidate, they were not for the purpose of influencing a federal election and did not constitute FEA.

1 Commission has examined such transfers, the 501(c)(3) entity was large and well-established
2 and the transfer did not appear to be earmarked for a specific expenditure. See AO 2007-26
3 (Schock) (approving donations of funds remaining in a state campaign account to charitable
4 organizations "in the nature of" the American Red Cross); AO 2003-32 (Tenenbaum) (approving
5 transfer of excess state campaign funds to a charitable organization so long as the donations are
6 not "earmarked or designated for any election activity"). Thus, based on the nexus between the
7 timing of the \$225,000 in donations to RB and its subsequent purchase of advertising featuring
8 Denham that constitutes electioneering communications, we recommend the Commission find
9 reason to believe that the Denham respondents violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R.
10 § 110.3(d) in connection with the donations to RB.¹⁴ Following our limited investigation, we
11 will make appropriate recommendations to the Commission regarding the violations in this
12 matter.

13 **D. Allegations regarding Undisclosed Coordinated/Independent Expenditures**

14 Complainants make general allegations that the Tribe, CFCL, and GBA (Dave Gilliard
15 and Carlos Rodriguez) made undisclosed coordinated communications and/or independent
16 expenditures in connection with the concert and/or the Denham campaign.¹⁵ However,
17 complainants did not provide any information to support these allegations. The complaint does

¹⁴ Apart from 2 U.S.C. § 441i(e)(1), under 2 U.S.C. § 441i(e)(4) and 11 C.F.R. 300.65(a), Federal candidates or officeholders may make a "general solicitation" on behalf of a 501(c) organization without regard to the Act's amount limitations or source prohibitions if (1) the organization does not engage in activities in connection with an election, including Federal election activity; or (2) the organization conducts activities in connection with an election, but the organization's principal purpose is to not to conduct election activity and the solicitation is not to obtain funds in connection with an election. We conclude that Denham's appearance in the ads did not constitute a solicitation of impermissible funds in violation of 2 U.S.C. § 441i(e)(4) because the funds appeared to have been raised solely for charitable purposes, i.e., donations to RB, a 501(c)(3) organization to benefit the Gold Star Project. 11 C.F.R. § 300.65(a)(1).

¹⁵ An independent expenditure is an expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate and which is not made in cooperation, consultation or concert with, or at the request or suggestion of, any candidate, candidate's committee, party committee or their agents. 11 C.F.R. § 100.16.

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1 not indicate specific communications that it alleges were coordinated with the Denham campaign
2 nor does it suggest any specific unreported independent expenditures allegedly made on the
3 Denham Federal Committee's behalf _____

4 The Tribe provided information regarding its in-kind contributions to RB in connection
5 with the concert and its promotional materials for the concert. None of the promotional materials
6 feature Donham or any other candidate. The CFCL stated that it was formed after the concert
7 and was not involved with it. CFCL also stated it made independent expenditures in the form of
8 radio ads during the period before the California primary election, but that the ads were not
9 connected to the benefit concert, were not coordinated with the Denham campaign, and were
10 properly disclosed to the Commission.

11 GBA is a campaign consulting firm and vendor for the Denham campaign that appears to
12 have purchased advertising for both the Denham campaign and the concert. David Gilliard
13 appears to be a partner and founder of the firm. Carlos Rodriguez appears to be a campaign
14 consultant who may have worked on the Denham campaign, based on news reports. See
15 <http://www.fresnobee.com/2010/02/19/1829324/radanovich-looks-to-future.html> (last visited on
16 March 14, 2011).

17 Complainants did not provide any information that ~~these respondents~~ made undisclosed
18 coordinated communications and/or independent expenditures. Accordingly, we recommend
19 that the Commission find no reason to believe that the Tribe, CFCL, GBA, Dave Gilliard, and
20 Carlos Rodriguez violated any provisions of the Act or Commission regulations in connection
21 with the allegations in this matter.

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IV. PROPOSED INVESTIGATION

A limited investigation is necessary to determine how much money was spent on the radio and television advertisement _____ We expect that this inquiry would also develop information as to whether any funds were donated for the specific ads featuring Denham. We would attempt to conduct this investigation informally, using written questions and requests for documents. We recommend that the Commission authorize the use of compulsory process in the event that it becomes necessary to utilize formal interrogatories, document subpoenas, and/or deposition subpoenas.

V. RECOMMENDATIONS

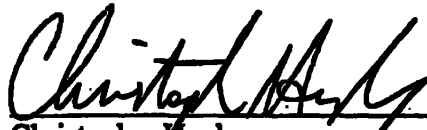
1. Merge MUR 6289 into MUR 6362.
2. Find no reason to believe that Remembering the Brave Foundation made prohibited in-kind corporate contributions resulting from coordinated communications in violation of 2 U.S.C. § 441b(a).
3. Find no reason to believe that Representative Jeff Denham accepted and received prohibited in-kind contributions resulting from coordinated communications in violation of 2 U.S.C. § 441b(a).
4. Find no reason to believe that Denham for Congress and David Bauer, in his official capacity as treasurer, accepted and received prohibited in-kind contributions resulting from coordinated communications in violation of 2 U.S.C. § 441b(a).
5. Find no reason to believe that Denham for Congress and David Bauer, in his official capacity as treasurer, failed to report in-kind contributions resulting from coordinated communications in violation of 2 U.S.C. § 434(b).
6. Find reason to believe that Remembering the Brave Foundation failed to report electioneering communications in violation of 2 U.S.C. § 434(f).
7. Find reason to believe that Remembering the Brave Foundation violated 2 U.S.C. § 441d by failing to include proper disclaimers on its radio and television advertisements.

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8. Find reason to believe that Jeff Denham, Jeff Denham for State Senate and David Bauer, in his official capacity as treasurer, and Denham for Congress and David Bauer, in his official capacity as treasurer, violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).
9. Find no reason to believe that the Picayune Rancheria of the Chukchansi Indians/Chukchansi Tribal Government, Californians for Fiscally Conservative Leadership, Gilliard, Blanning & Associates, Inc., David Gilliard, and Carlos Rodriguez violated any provisions of the Act or regulations in connection with the allegations in these matters.
10. Authorize the use of compulsory process as to all Respondents and witnesses in this matter, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.
11. Approve the attached Factual and Legal Analyses.
12. Approve the appropriate letters.

4-13-2011

Date


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